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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/698,640	10/27/2000	Jeffrey S. Marks	IMS 06-05	4914
43785	7590	05/15/2008		
JAS IP CONSULTING 309 2nd STREET SUITE 8 LOS ALTOS, CA 94022			EXAMINER MAGUIRE, LINDSAY M	
			ART UNIT	PAPER NUMBER
			3692	
			MAIL DATE	DELIVERY MODE
			05/15/2008	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/698,640	<b>Applicant(s)</b> MARKS, JEFFREY S.	
	<b>Examiner</b> LINDSAY M. MAGUIRE	<b>Art Unit</b> 3692	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 March 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-4, 6-11 and 20-26 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 6-11, 20-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### DETAILED ACTION

This Final office action is in response to the application filed on October 27, 2000, the amendments filed on March 19, 2004, the Request for Continued Examination filed on May 4, 2005, the amendments filed on February 24, 2006, the Request for Continued Examination filed on September 11, 2006, the amendments filed on June 15, 2007, and the amendments filed on March 3, 2008.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-2, 4, 6-7, 9 and 20-26 rejected under 35 U.S.C. 103(a) as being unpatentable over Shkedy (US 6,260,024) in view of Bi et al (hereinafter Bi US 6,311,178 B1).

Re Claim 1: Shkedy discloses a computer implemented method for an online auction of the type wherein a plurality of customers may purchase a product supplied by one or more merchants, said method comprising the steps of:

- Acquiring over a network, customer information from said plurality of customers (See Fig 1, Buyers A-E; Column 8 lines 45-49), said customer information including Program Terms associated with said product (Column 13, lines 35-43; preferences indicated; Also see Column 5 lines 31-42 selection of different color pens; and Column 7 line 59-Column 8 line 5)
- Automatically grouping each of said plurality of customers into one or more pools prior to an auction in accordance with said selected Program Term (Column,3, lines 39-52), wherein said Preferred Program Term comprises indicia associated with said product (See ball point pen example Column 5, lines 31-42 and Airline example Column 13, lines 35-43)
- Receiving, over said network, bids from said one or more merchants in connection with providing said

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product collectively to at least one of said one or more pools of said plurality of customers (Column 3, lines 52-55)

- Comparing said bids from said merchants to select a preferred bid from a preferred merchant for said at least one of said one or more pools of said, plurality of customers (Column 3, lines 55-56).
- Notifying, over said network, said preferred merchant of said preferred bid (Fig 9; Ref 970) Shkedy does not explicitly disclose the step wherein said customer information includes a preference ranking of more than one Program Terms such that one of said Program Terms becomes a selected Preferred Program Term. Bi discloses a multi-element confidence matching system where multiple elements are entered as search criteria, each of said elements is assigned a weight of importance thereby each matching result has a score indicating satisfaction level of said user (Abstract). It would have been obvious to a person of ordinary skill in the art to include the teachings of Bi to the disclosure of Shkedy to add a level of sophistication and implement the users preferences in accepting or rejecting potential matches. By involving more parameters of user's choices, the system will be able to tolerate the result and based on user's preference accept those cases that comply with the most important conditions and only fail to satisfy minor conditions.

Re Claim 2: Shkedy in view of Bi discloses the method of claim 1 supra but does not explicitly disclose wherein said grouping step includes grouping said customers via characteristic pooling in accordance with a Program Term associated with a characteristic of said customers. However, Shkedy does note that this system and method can apply to any commerce situation involving buyers and sellers (see abstract) and further lists certain types of these situations including the potential exchange of rental cars, insurance and mortgages (Column 13, lines 19-22). It was notoriously well known, and obvious to anyone of ordinary skill in the art at the time of invention that these situations often require customer characteristic information in order to be grouped. For example, rates for rental cars, insurance and mortgage are variable greatly based upon customer characteristics like age, credit history and location and therefore in order to get an appropriate pool, listing these characteristics as part of the conditions would be advantageous. This will allow for a better overall match between pooled applicants, making it more likely

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that a seller will place a bid.

Re Claim 4: Shkedy in view of Bi discloses the claimed method supra and Shkedy further discloses wherein potential customers are grouped into ghost pools, and wherein said merchants bid on said ghost pools to obtain the right to provide a previously agreed upon number of said potential customers with said product (Column 7, lines 26-42).

Re Claim 6: Shkedy in view of Bi discloses the claimed method supra and Shkedy further discloses grouping said customers into at least a second pool comprising at least one of a Characteristic Pool and a Commitment Pool (Column 16, lines 21-28; a subset of PPO's representing a particular condition").

Re Claim 7: Shkedy in view of Bi discloses the claimed method supra but does not explicitly disclose repeating said receiving and comparing steps in successive auction stages based upon at least one of successive Program Terms and successive pool groupings to arrive at a final preferred bid relative to said pool. However it would have been obvious to anyone of ordinary skill at the time of invention to include this step to the method of Shkedy so that the best possible bid, relative to the pool, can be secured. In many situations there are a number of variables relative to the pools that factor into the selection of a bid. While one particular variable may be most important, there may be a number of other secondary variables that can assist in further defining which bid is "optimal." If multiple bidders satisfy the primary concern of the pool, by repeating the receiving and comparing steps for the secondary variables, the method can further define which bid truly is the most consistent with the overall needs of the pool.

Re Claim 9: Shkedy in view of Bi discloses the claimed method supra but does not explicitly disclose the step wherein said ghost pool comprises all customers signing up for said product during a particular time frame. However this step would have been obvious to anyone skilled in the ordinary art as part of the negotiated terms of the supply contract (Column 7, lines 26-29). If no time frame were presented as part of this

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deal, the supply contract would essentially be a quasi-life contract and would stifle the auction process that the method seeks to establish. While the method mentions beating the "published" price of competitors, an even lower price could be established through the auction process. While a pre-arranged contract has its place, setting a limit in terms of time frame would be obvious as a means to encourage future price competition among vendors.

Re Claim 20: Shkedy discloses a method of providing an on-line market place for goods and services to a plurality of users and a plurality of bidders, comprising:

- Providing an online user interface which displays for selection a good or service (Column 13, lines 7-19)
- Receiving a selection of a good or service (Column 13, line 17-19)
- Automatically grouping users into a pool, prior to an auction, such that each user in said pool has indicated a similar preference for said preferred one of said terms. (Column 14 line 7-25)
- Providing a plurality of bidders an indication of said good or service together with an indication of said terms (Column 16 line 21-28 "subset of PPOs representing a particular condition.")
- Providing an online user interface permitting said plurality of bidders to enter an auction bid to provide said good or service, including said terms, to said pool of users (Column 16 lines 15-28)
- Receiving at least one bid from said plurality of bidders to provide said good or service (Column 16 line 62-Column 17 line 3)
- Comparing all said bids from said plurality of bidders to select a preferred bid therefrom (Column 17, line 32-49) • Notifying the bidder providing said preferred bid that theirs is said preferred bid (Column 17, line 50-54)

Shkedy does not explicitly disclose the steps of

- Providing an online interface, dependent upon the selection of good or service which displays for selection a plurality of terms associated with said selected good or service, said selection indicative of a preferred one of said terms • Receiving said selection of said preferred one of said terms Bi discloses a multi-element confidence matching system where multiple elements are entered as search criteria, each of said elements is assigned a weight of importance thereby each matching result has a score indicating

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satisfaction level of said user (Abstract). It would have been obvious to a person of ordinary skill in the art to include the teachings of Bi to the disclosure of Shkedy to add a level of sophistication and implement the users preferences in accepting or rejecting potential matches. By involving more parameters of user's choices, the system will be able to tolerate the result and based on user's preference accept those cases that comply with the most important conditions and only fail to satisfy minor conditions.

Re Claim 21: Shkedy in view of Bi discloses the claimed method supra and Shkedy further discloses the step further comprising grouping the users within said pool into groups according to a criteria comprising at least one of an express commitment to be bound by said preferred bid (Column 3, line 6-8), a common demographic characteristic of said plurality of customers, and a preferred grouping criterion selected by said plurality of customers.

Re Claim 22: Shkedy in view of Bi discloses the claimed method supra and but does not explicitly disclose the step further comprising estimating the number of members of a pool and providing said estimate to said plurality of bidders together with said indication of said good or service and said indication of preferred one of said terms. However, Shkedy does disclose wherein a potential bidder may request complete details of an order (Column 16, lines 51-57). Official Notice is taken that it is old and well known in the art for pooled contracts such as the one disclosed by Shkedy to contain an estimate of the number of members of a pool. One would be motivated to include this step so that the bidder could factor other expenses, such as shipping costs, into the price of their bid. For example, shipping many goods to one location is known to be less expensive than having to ship many goods to multiple locations and any prudent seller would request this information.

Re Claim 23: Shkedy in view of Bi discloses the claimed method supra and Shkedy further discloses the step of providing an on-line user interface which displays for selection at least one period of time during which a user will commit to accept and be bound by a preferred bid; receiving for a user a selection of one of said at least one

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period of time and grouping the user with said pool into groups based upon said selection of said at least one period of time (Column 14 line 7-25).

Re Claim 24: Shkedy in view of Bi discloses the claimed method supra but does not explicitly disclose the steps or repeating said step of providing to a plurality of bidders an indication of said goods or service together with an indication of said preferred one of said terms and repeating said step of receiving at least one bid from said plurality of bidders in successive auction stages based on alternative groupings of said plurality of customers according to different grouping criteria. However Shkedy does disclose that bidders can elect to receive all PPO's in a category of subset representing a particular condition and then bid on the appropriate PPOs (Column 16, lines 21-28). Official Notice is taken that it would have been obvious to repeat the aforementioned steps so that bidders who may not have been successful on an initial contract, can go to an alternative pool to try and liquidate their goods and/or service. One would be motivated to include this step so that sellers have more than one shot to utilize the system to move their inventory.

Re Claim 25: Shkedy in view of Bi discloses the claimed method supra and Shkedy further discloses establishing a term ratio as a function of grouping criteria to facilitate grouping of said plurality of users based on at least one of a varied selection and varied ranking of said grouping criteria (Column 15, lines 42-57; pooling of blue and black pens).

Re Claim 26: Shkedy in view of Bi discloses the claimed method supra and Shkedy further discloses wherein said Term Ratio facilitates adjustment of a bid value relative to a second of said grouping criteria based on a bidder's bid relative of said grouping criteria (Column 7 line 59-Column 8 line 5; adjustment (i.e modify terms) is facilitated based on substitution effect).

Claim 3, 8, and 10-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shkedy in view of Bi in view of Shoham (US 6,584,451 B1).



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Re Claim 3: Shkedy discloses the method of claim 1 supra but does not explicitly disclose the step wherein said grouping step includes grouping said customers via commitment pooling in accordance with a Program Term associated with the customer's level of commitment. Shoham discloses a facilitator for aggregating buyer power in an online market system that allows potential buyers the option of submitting conditional bids (Column 6, lines 48-60). Shoham also leaves open the possibility of a withdrawal of initial buyer interest (Column 6, lines 17-27). It would be obvious to anyone of ordinary skill at the time of invention to include the teachings of Shoham to the disclosure of Shkedy so that a potential buyer can indicate their unwavering commitment to the purchase of an item and therefore be pooled with other like buyers. This represents a firm commitment to the potential seller and they will be more willing to offer lower prices or better terms to this group as they will have a better idea of the true nature of the deal than with groups of conditional offers or withdrawal options.

Re Claim 8: Shkedy in view of Bi in view of Shoham discloses the claimed method supra and Shkedy further discloses wherein said level of commitment is determined by a prior affirmative commitment by said customers to purchase said product in accordance with said preferred bid by said preferred merchant (Column 8, lines 49-50).

Re Claim 10 and 11: Shkedy in view of Bi discloses the claimed method supra but does not explicitly disclose calculating a Term Ratio as a function of different rankings of said two or more program terms by said plurality of customers to facilitate grouping of customers who provided different rankings into a common pool to further facilitate bidding by merchants on the opportunity to provide said product to said customers with said common pool. Shoham discloses the use of seller schedules wherein a seller releases the price of a product as a function of quantity. In other words the seller states his willingness, via some function, to decrease the per unit price of said product depending on the total amount of units sold. It would have been obvious to anyone of ordinary skill at the time of invention to include the teachings of Shoham to the disclosure of Shkedy so that buyers can issue a range of possible FPO's and can be pooled even if they are not in complete lock step with one another. At some points in the seller

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schedule, the buyers may be in agreement, and can thus be pooled to take advantage of the power of aggregating their orders.

### ***Response to Arguments***

Applicant's arguments filed March 3, 2008 have been fully considered but they are not persuasive.

Applicant's arguments that, "neither Shkedy nor Bi et al. teach this pooling together of buyers based on their ranking of preference as between a number of terms associated with a product[.]" are acknowledged, however examiner is of another opinion. Specifically, Shkedy discloses that:

"In another embodiment of the present invention, the intermediary could pre-negotiate a supply contract with a major supplier, prior to forming the buyer pool. Prospective buyers could view the pre-negotiated contract as a criterion for deciding whether or not they wish to participate in the pool. The pre-negotiated seller contract terms would be automatically available to any individual who joins the pool. In this embodiment, the intermediary pre-negotiates a contract with a seller such as an office supply company whereby the terms of the contract specify that the office supply company would beat any published competitors price and provide an additional 5% discount to the collective buyer pool on condition that the intermediary (i.e. collective buyer pool) exclusively purchase supplies from them for a whole year. Under this scenario, the pool is unconditionally guaranteed an up-front cost savings." (column 7, lines 26-42)

Therefore Shkedy discloses pooling buyers together based on their ranked preference since the term pooling, as defined by Webster's II Dictionary, is "to combine in a shared fund or mutual use or advantage." This definition fully supports the recitation, as advanced above, and therefore Shekdy fully meets the limitations as set forth in the claims.

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Furthermore, applicant's arguments that, "[t]here is no concept of preference in Shkedy[.]" are acknowledged, however examiner is of another opinion. Specifically, applicant lists that, "Shkedy teaches only that a user may specify an item, quantity of such an item, an outside shipping date, and an auction date" all of which fall under the umbrella of preferences. Therefore Shkedy fully meets the limitations as set forth in the claims.

Applicant initially argues that Shkedy does not disclose each and every limitation and points to applicants own specification. Although a claim should be interpreted in light of the specification disclosure, it is generally considered improper to read limitations contained in the specification into the claims. See *In re Prater*, 415 F.2d 1393, 162 USPQ 541 (CCPA 1969) and *In re Winkhaus*, 527 F.2d 637, 188 USPQ 129 (CCPA 1975), which discuss the premise that one cannot rely on the specification to impart limitations to the claim that are not recited in the claim. In this instance, even through reading limitations from the applicants specification into the claims, which is technically improper, Shkedy still discloses the limitations. For example the user designates Preferred Program Term is "one of a series of terms associated with a good or service to be auctioned which a user designates as their preference." Shkedy discloses that a buyer may select a 400 MHz PC Computer, while further differentiating between the make of the computer as primary or secondary (Column 7, lines 59-Column 8 line 5). There are other examples throughout Shkedy of selecting a preferred term, such as a color of a type of pen to be delivered (Column 15, lines 42-57) or the dates or class or a particular airline flight (Column 13, lines 36-44). Furthermore it is noted that the applicant suggests that the system of Shkedy cannot allow a seller to make calculated trade-offs to provided the preferred term, yet Shkedy explicitly discloses exactly that (Column 7 line 61-65). Therefore these rejections are maintained.

With respect to the 103 rejections, the applicant argues that in order to show obviousness there must be some suggestion in the reference to make such a modification. This is only partially true. A suggestion, teaching, or motivation to combine the relevant prior art teachings does not have to be found explicitly in the prior art, as the teaching, motivation, or suggestion may be implicit from the prior art as a

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whole, rather than expressly stated in the references ....The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art. In re Kotzab, 217 F.3d 1365, 1370 (Fed. Cir. 2000). However, rejections on obviousness grounds cannot be sustained by mere conclusion statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness. See Lee, 277 F.3d at 1343-46; Rouffett, 149 F.3d at 1355-59. In each instance the examiner has provided a reasoned statement as to why a person of ordinary skill in the art, in view of the prior art as a whole and the problem to be solved, would have been motivated to make the modification. Therefore these rejections are maintained.

Applicant's arguments that Shkedy doesn't disclose two pools, a characteristic pool and a commitment pool, are acknowledged. However, Shkedy teaches that a seller may request to receive purchase orders representing a particular condition, i.e. a characteristic. Furthermore, the level of commitment can also be a characteristic, since how committed to a purchase a seller is can be determined by how quickly an item would be delivered. Therefore, Shkedy fully meets the limitations of the claims.

Regarding applicant's arguments against "Official Notice" taken in claims 2, 7, and 9, the following evidence is cited:

Claim 2: U.S. Pat. No. 6,397,197 (columns 1-6);

Claim 7: US PGPub 2001/0056396, paragraphs [0137, 0144, & 0547];

Claim 9: US PGPub 2001/0056396, paragraph [0063] (i.e. auction start and end time).

Applicant's arguments that there is no suggestion of the concept of a "Term Ratio," are acknowledged. However, Shkedy discloses:

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“An example of a pooling process performed by the intermediary (central controller) 200 is now described. Buyer A wishes to purchase two dozen BIC medium point black roller ball pens for a maximum price of \$5.00 per dozen. Buyer B wishes to purchase one dozen BIC medium point black roller ball pens for \$5.00 per dozen, one dozen BIC medium point blue roller ball pens for \$4.00 per dozen and one dozen pencils at \$2.00 per dozen. The pooling or aggregation process adds the two FPOs to form a combined PPO 110 of three dozen BIC medium point black roller ball pens at \$5.00 per dozen, one dozen BIC medium point blue roller ball pens at \$4.00 per dozen and one dozen pencils at \$2.00 per dozen. In another embodiment, the PPO 110 would be three dozen BIC medium point black roller ball pens, one dozen BIC medium point blue roller ball pens and one dozen pencils for a maximum price of \$21.00.” (column 15, lines 42-57).

Therefore, Shkedy is considered to fully meet the limitations on the claims.

Applicant's arguments that, Shoham merely addresses variations in the bidding process and does not assign a level of commitment to an offer, are acknowledged. However, Shoham teaches making all offers firm, which is a level of commitment, i.e. if the offer is firm, then the buyer has given the level of commitment of purchasing the items no matter what.

### ***Conclusion***

Examiner has pointed out particular references contained in the prior arts of record in the body of this action for the convenience of the applicant. Although the specified citations are representative of the teachings in the art and are applied to the specific limitations within the individual claim, other passages and figures may apply as well. It is respectfully requested from the applicant, in preparing the response, to consider fully the entire references as potentially teaching all or part of the claimed invention, as well as the context of the passage as taught by the prior arts of disclosed by the examiner.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to LINDSAY M. MAGUIRE whose telephone number is (571)272-6039. The examiner can normally be reached on M-F: 7-4.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kambiz Abdi can be reached on (571) 272-6702. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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